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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

REPUBLICAN CAUCUS OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES,
Appellant

v.

RICHARD VIETH, *et. al.*
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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MAY 21, 2002

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QUESTION PRESENTED

Whether the doctrine of legislative privilege prohibits discovery of documents created within the "sphere of legitimate legislative activity" for state legislators engaged in enacting a congressional redistricting statute.

PARTIES

The parties to this appeal are the Republican Caucus of the Pennsylvania House of Representatives (Intervenor below and Appellant herein) and Richard & Norma Jean Vieth and Susan Furey (Plaintiffs below).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 8

STATEMENT OF THE CASE 8

THE QUESTION IS SUBSTANTIAL 11

A. Common Law Legislative Immunity 11

B. Legislative Immunity Extends to Discovery 14

C. Application 15

D. Importance of the Issue 17

CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Bogan v. Scott-Harris, 523 U.S. 44 (1998) ..... *passim*

Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995)..... 14, 15

Burtnick v. McLean, 76 F.3d 611 (4th Cir. 1996)..... 15

Doe v. McMillan, 412 U.S. 306 (1973) 16, 17

Dombrowksi v. Eastland, 387 U.S. 82 (1967) 14

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975)..... 16, 17

Fletcher v. Peck, 6 Cranch 87 (1810) 13, 14

Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974)..... 3, 4, 6

Government of the Virgin Islands v. Lee, 775 F.2d 514 (3d Cir. 1985) 15, 16, 17

Gravel v. United States, 408 U.S. 606 (1972) 14, 16

Harris v. Nelson, 394 U.S. 286 (1969) 7

Kilbourn v. Thompson, 103 U.S. 168 (1881)..... 16

MINPECO, S.A. v. Conticommodity Services, Inc., 844 F.2d 856 (D.C. Cir. 1988)..... 14

MTM, Inc. v. Baxley, 420 U.S. 799 (1975)..... 3, 4, 6

Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983) 14

New York v. United States, 505 U.S. 144 (1992)..... 12

Pennsylvania Bureau of Corrections v. U.S. Marshals, 474 U.S. 34 (1985)..... 7

Pentagen Technologies International Ltd. v. Committee on Appropriations of the United States House of Representatives, 20 F. Supp. 2d 41 (D. D.C. 1998)..... 17

Price v. Johnston, 334 U.S. 266 (1984)..... 7

Printz v. United States, 521 U.S. 898 (1997)..... 12

Query v. United States, 316 U.S. 486 (1942) 4, 5

Reynolds v. Sims, 377 U.S. 533 (1964)..... 17

In re Slagle, 504 U.S. 952 (1992)..... 3, 4

Smith v. Apple, 264 U.S. 274 (1924) 7

Street v. Shipowners' Association of the Pacific Coast, 263 U.S. 334 (1923) 7

Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980) 11, 12

Tenney v. Brandhove, 341 U.S. 367 (1951)..... *passim*

United States v. Gillock, 445 U.S. 360 (1980)..... 11, 12

United States v. Helstoski, 442 U.S. 477 (1979)... 12, 13, 16

United States v. Johnson, 383 U.S. 169 (1966) 13, 16

United States v. O'Brien, 391 U.S. 367 (1968) 14

Walling v. James V. Reuter Inc., 321 U.S. 671 (1944) 5

CONSTITUTIONS

U.S. CONST., art. I, §6 ..... 8, 12

STATUTES

28 U.S.C. §610 7

28 U.S.C. §1253 ..... *passim*

28 U.S.C. §1631 7

28 U.S.C. §1651(a) 7

28 U.S.C. §2284(a) 1

RULES AND REGULATIONS

Fed.R.Civ.P. 26 (b)(1) 8

Supreme Court Rule 18.3 2

MISCELLANEOUS

17 FEDERAL PRACTICE AND PROCEDURE §4040 (1988 & 2002 Supp.) 6

Robert L. Stern et al., SUPREME COURT PRACTICE §§2.8-2.9 (7th ed. 1993) 6

II WORKS OF JAMES WILSON (Andrews ed. 1896) 13

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JURISDICTIONAL STATEMENT

INTRODUCTION

In the underlying action, plaintiffs challenged the constitutionality of state legislation establishing congressional districts for the 19 seats apportioned to the Commonwealth of Pennsylvania after the 2000 federal census. Pursuant to 28 U.S.C. §2284(a), a three-judge court was convened to hear the challenge.

The present appeal involves a discovery dispute that arose when plaintiffs subpoenaed documents from a non-

party, a consultant that was providing research and analysis for the House Republican Caucus of the Pennsylvania General Assembly ("Caucus"). The Caucus opposed the subpoena on the ground that the documents were protected against disclosure by the common-law legislative privilege. The Caucus was permitted to intervene in the proceedings for the limited purpose of opposing the subpoena. The three-judge court (by order of a single judge) denied a motion for protective order.

The Caucus appealed the denial of the protective order to the United States Court of Appeals for the Third Circuit. The Court of Appeals notified the Caucus of a possible jurisdictional defect, based on 28 U.S.C. §1253, that could result in dismissal of its appeal. The Caucus opposed dismissal and also filed a parallel appeal to this Court. Since it is unlikely that the Court of Appeals will rule on the jurisdictional issue before May 21, 2002 (i.e., 60 days from the date of filing the notice of appeal to this Court), the Caucus submits this Jurisdictional Statement in accordance with Supreme Court Rule 18.3.

OPINION BELOW

No opinion supporting the order denying the motion for protective order was issued and the order is not reported. A copy of the order appears in the Appendix ("App.") at 1a.

JURISDICTION

As noted in the Introduction, prior to filing an appeal with this Court, the Caucus filed a timely appeal with the United States Court of Appeals for the Third Circuit (No. 02-1580) from the order of the three-judge

court denying the motion for protective order. App. at 2a. By letter dated February 28, 2002, counsel were advised by the Clerk of the Court of Appeals that the appeal had been listed for dismissal for lack of jurisdiction. App. at 4a-6a ("[i]t appears that the Court of Appeals lacks jurisdiction over the matter under 28 U.S.C. Section 1253"). Section 1253 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order *granting or denying*, after notice and hearing, *an interlocutory or permanent injunction* in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. §1253 (emphasis added).

As the Court of Appeals requested, the Caucus submitted a letter brief, explaining its basis for urging that the Court of Appeals had appellate jurisdiction. App. at 7a-15a. The Caucus explained to the Court of Appeals that this Court's precedent interpreting Section 1253 supported appellate jurisdiction in the Court of Appeals for issues collateral to the merits of a challenge to the legality of a reapportionment plan. *See id.* at 11a-12a (citing, *inter alia*, *MTM, Inc. v. Baxley*, 420 U.S. 799 (1975) (Supreme Court without jurisdiction under Section 1253 to review order of three-judge court dismissing action on the basis of abstention); *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974) (Supreme Court without jurisdiction to review order of three-judge court dismissing claim for lack of standing); *In re Slagle*, 504 U.S. 952 (1992) (White, J., dissenting to explain reason for dismissal

of certified question) (mandamus petition to compel individual member of three-judge court to disqualify himself lies in court of appeals, not Supreme Court). Plaintiffs filed no response.

On March 22, 2002, to preserve its right of direct appeal should the Court of Appeals ultimately decline jurisdiction on the basis of Section 1253, the Caucus filed a protective and timely notice of appeal to this Court. App. at 16a. To date, the Court of Appeals has not resolved the jurisdictional issue or issued a briefing schedule in the appeal before it. The case manager assigned to the appeal informed undersigned counsel that, as of May 17, 2002, the jurisdictional issue had not yet been assigned to a panel for resolution.

The Caucus believes, for the reasons set forth in its letter brief to the Court of Appeals, that the Court of Appeals and not this Court has jurisdiction to hear the present appeal, which is truly collateral to the merits of the challenge to the redistricting statute. The Caucus files this Jurisdictional Statement in support of its protective appeal solely to preserve its right to a direct appeal. In situations involving a three-judge court where a party has appealed to the wrong court as between this Court and a court of appeals, this Court has acted to preserve the party's right to direct appeal. For example, in both *Gonzalez*, 419 U.S. at 101, and *MTM,* 420 U.S. at 804, this Court, after finding that the appeal before it should have been brought to the appropriate court of appeals, vacated the order of the three-judge court and remanded "so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." Similarly, in *Query v. United States*, 316 U.S. 486 (1942), where the opposite situation occurred, this Court stated:

> [T]he cause was a proper one for a three-judge court and appeal did not lie to the Circuit Court of Appeals. But a direction by us to the Circuit Court of Appeals to dismiss the appeal which the petitioners brought to it would, without more, terminate the litigation. For the time within which a direct appeal might have been brought to this Court under Section 266 has elapsed. *In the present circumstances, however, we think the petitioners' right to such an appeal should be preserved.* The judgment below is therefore vacated and the cause remanded to the district court for the entry of a fresh decree from which a timely appeal may be taken [to the Supreme Court] if the petitioners so desire.

Id. at 490-91 (internal citation omitted and emphasis added). *See also Walling v. James V. Reuter Inc.*, 321 U.S. 671, 677 (1944) ("When [the Supreme Court] is without jurisdiction to decide an appeal which should have been prosecuted to another court, it may vacate the judgment and remand the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken.").

In the present situation, there is no need to vacate the order below since the Caucus filed timely appeals to both the Court of Appeals and to this Court. However, the current state of the law regarding appeals from three-judge

courts under Section 1253 is confusing.[1] The Caucus reasonably believed it had correctly interpreted this Court's jurisprudence in appealing to the Court of Appeals. The Caucus, which is not a party to the case before the three-judge court on the merits, should not be punished through the loss of a direct right of appeal for its legally supportable position on jurisdiction in the court of appeals. As reapportionment cases are currently the only three-judge court cases using Section 1253 as a vehicle for direct appeal to this Court, it is imperative, in the interests of controlling the docket of this Court,[2] for the Court to monitor interpretation of that provision.

Accordingly, the Caucus believes that, in this unique situation, it would be appropriate and consonant

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[1] *See* 17 FEDERAL PRACTICE AND PROCEDURE §4040, 134 (1988 & 2002 Supp.) (exploring the "labyrinthian and even bizarre body of jurisdictional rules [that] has grown up around §1253"); Robert L. Stern et al., SUPREME COURT PRACTICE §§2.8-2.9 (7th ed. 1993) (citing the Freund Committee Report) ("[w]hen, where and how to obtain appellate review of an order by or relating to a three-judge court is a hopelessly complicated and confused subject ... review of these matters has become so mysterious that even specialists in this area may be led astray"). The fact that the Court of Appeals has potentially identified a jurisdictional defect is itself evidence of the uncertainty surrounding the interpretation of Section 1253.

[2] This Court has stated repeatedly that Section 1253 should be narrowly construed in light of the "historic congressional policy of minimizing the mandatory docket of the Court in the interest of sound judicial administration." *MTM*, 420 U.S. at 804; *see also Gonzalez*, 419 U.S. at 99.

with prior precedent recognizing the importance of preserving a party's direct right of appeal, for this Court to take one of four alternative actions. First, it could dismiss the present appeal for lack of jurisdiction, and include, in its order of dismissal, a statement that the Court of Appeals, as opposed to this Court, has jurisdiction over an appeal from an order denying a motion for protective order. Second, this Court could transfer the appeal presently before it for resolution by the Court of Appeals.[3] Third, this Court could stay its proceedings in this appeal pending resolution of the jurisdictional issue in the Court of Appeals and (a) if that court dismisses the appeal on the

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[3] There is presently no explicit authority for this Court to transfer an appeal filed under Section 1253 to the Court of Appeals. From 1922 to 1928, Section 238 of the Judicial Code allowed such a transfer. *See Street v. Shipowners' Association of the Pacific Coast*, 263 U.S. 334 (1923) (transferring appeal erroneously filed in Supreme Court to court of appeals pursuant to Section 238(a)); *Smith v. Apple*, 264 U.S. 274 (1924) (same). The current transfer provisions of 28 U.S.C. §1631 do not apply because they are limited to "courts" as defined in 28 U.S.C. §610, which definition does not include the Supreme Court. Nonetheless, as a transfer in this situation would be consonant with fairness and justice and "agreeable to the usages and principles of law," the Caucus believes that a transfer could be effected on the statutory authority of the All Writs Act, 28 U.S.C. §1651(a). *See Harris v. Nelson*, 394 U.S. 286, 298 (1969) (All Writs Act serves as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law'") (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948)); *Pennsylvania Bureau of Corrections v. U.S. Marshals*, 474 U.S. 34, 42 (1985) (All Writs Act empowers federal courts to fashion remedies where the need arises).

basis of Section 1253, treat the present Jurisdictional Statement as a Petition for Writ of Certiorari, vacate the Court of Appeals' order and direct that it hear the Caucus' appeal, or (b) if that court decides to entertain the appeal, dismiss the present appeal. Fourth, should this Court, under any theory, determine that, for purposes of Section 1253, the issuance of compulsory process by a three-judge court is tantamount to the issuance of an injunction, this Court should note probable jurisdiction of the appeal before it and proceed to address the merits.[4]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions directly involved in this matter. Federal Rule of Civil Procedure 26(b)(1), allowing for the assertion of privileges against discovery, is implicated, as is the Speech or Debate Clause of the United States Constitution, U.S. CONST., art. I, §6, which embodies the principles from which the common-law legislative privilege is derived.

STATEMENT OF THE CASE

As noted in the Introduction, the underlying action presented a challenge to legislation establishing 19 congressional districts in Pennsylvania following the 2000 federal census.[5] Named as defendants were the

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[4] It is in support of this fourth alternative that the Caucus offers the remainder of this Jurisdictional Statement.

[5] On April 8, 2002, the three-judge court declared the redistricting statute unconstitutional under the principle of one-person, one-vote and enjoined its implementation by

Commonwealth of Pennsylvania,[6] the Governor of Pennsylvania, the Secretary of the Commonwealth and the Commissioner of Elections ("Executive Officers"), as well as the Lieutenant Governor and President of the Senate of Pennsylvania and the Speaker of the House of Representatives of Pennsylvania ("Presiding Officers"). Plaintiffs were three individual voters, Richard & Norma Jean Vieth and Susan Furey. By order dated January 29, 2002, the three-judge court (Nygaard, C.J., Rambo, and Yohn, D.J.) established a hearing date of March 11-12, 2002 for the substantive challenges and issued a limited and expedited discovery schedule.

On February 8, 2002, plaintiffs served a subpoena *duces tecum* ("subpoena") on the Custodian of Records of the Carnegie Mellon University, seeking production of the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of

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defendants. Three appeals from that order have been filed with this Court by the original parties to the action.

[6] The Commonwealth was dismissed as a defendant based on Eleventh Amendment immunity.

> that Caucus, and/or any employee or representative of any member pertaining to that contract.

App. at 18a.

On February 19, 2002, Presiding Officers, having only learned of the subpoena on February 18, 2002, moved to quash the subpoena, or alternatively, for a protective order. In their supporting brief, Presiding Officers argued that the subpoena should be quashed or a protective order should issue to prohibit the discovery as violative of the common law legislative privilege. App. at 20a, 22a. The Caucus sought, and was granted, leave to intervene for the limited purpose of joining the motion. App. at 37-43a, 44a-45a.

On February 22, 2002, the three-judge court (by order of a single judge) denied the motion to quash the subpoena and/or for protective order. App. at 1a (Rambo, J.). Immediately, Presiding Officers and the Caucus jointly sought a stay of this order. App. at 46a. However, on February 26, 2002, the court dismissed the stay request as moot because the documents had been produced by the non-party subject to the subpoena.[7] App. at 49a. As noted above, timely notices of appeal were then filed by the Caucus to the Court of Appeals for the Third Circuit and to this Court. App. at 2a, 16a.

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[7] On February 25, 2002, the Custodian of Records of the Carnegie Mellon University produced most of the documents requested. The Caucus is pursuing the appeals because the issue is an important one capable of recurring and repeatedly evading review and because such subpoenas are disruptive of the legislative process.

THE QUESTION IS SUBSTANTIAL

This appeal raises an issue of significant national importance as it pertains to the independence of state legislatures and individual legislators, and the integrity of the state legislative process. This Court should entertain the appeal (if the Court of Appeals does not) to ensure all state legislatures and legislators, in the course of carrying out their core legislative functions, freedom from interference by parties engaged in civil litigation in the federal courts.

A. Common Law Legislative Immunity

In *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), this Court recognized a common-law legislative immunity for state legislators that protects them, absolutely, from liability for actions undertaken "in the sphere of legitimate legislative activity." *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (unanimously reaffirming the existence of the common law legislative immunity and clarifying its extension to local legislators).

The common law legislative immunity recognized in *Tenney* (and subsequently extended to local and regional legislators) is co-extensive in civil matters with that provided members of Congress under the Speech or Debate Clause. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 733 (1980) ("Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, United States v. Gillock, 445 U.S. 360 ... (1980), we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded

Congressman under the Constitution.").[8] The federal Speech or Debate Clause, which provides immunity for federal legislators, was but a "reflection of political principles already firmly established in the States." *Tenney*, 341 U.S. at 373. The federal Speech or Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST., art. I, §6.

Legislative immunity is intended "to preserve the constitutional structure of separate, coequal, and independent branches of government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). As explained in *Tenney*: "'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offence.'"

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[8] While this Court, in *United States v. Gillock*, held that the common law legislative privilege did not bar the introduction of evidence concerning a state legislator's support of legislation in a federal criminal action for bribery, this Court has not extended the *Gillock* rationale to civil matters involving state legislators and assertion of the privilege. Notably, *Supreme Court of Virginia* was decided less than three months after *Gillock* and the *Tenney* decision was recently reaffirmed in *Bogan*. To the extent, moreover, that *Gillock* may be read as a limitation on the viability and scope of the common law legislative privilege, recent decisions of this Court undermine the *Gillock* Court's reasoning. *See e.g., New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997).

341 U.S. at 373 (quoting II WORKS OF JAMES WILSON (Andrews ed. 1896) at 38); *see also Bogan*, 523 U.S. at 52 ("Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference."). "[T]he privilege was *not* born primarily of a desire *to avoid private suits* ... but rather to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Helstoski*, 442 U.S. at 491 (quoting *United States v. Johnson*, 383 U.S. 169, 180-81 (1966)) (emphasis added).

Tenney and subsequent cases recognize that the privilege operates to protect the process by which legislation is developed, as opposed to the interests of the individual legislator. The *Tenney* Court's explanation of why the privilege cannot be easily defeated shows this:

> We come then to the question whether from the pleadings it appears that *the defendants were acting in the sphere of legitimate legislative activity*. ... The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. ... The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial *upon the conclusion of the pleader*, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377 (emphasis added); *see also Fletcher v. Peck*, 6 Cranch 87, 130 (1810) (not consonant with our

scheme of government for a court to inquire into the motives of legislators); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("[i]nquiries into Congressional motives or purposes are a hazardous matter").

B. Legislative Immunity Extends to Discovery

The absolute legislative immunity recognized in *Tenney* extends beyond protection from liability and the right to be dismissed as a defendant from civil suit. It also provides legislators with protection from "the burden of defending themselves when engaged 'in the sphere of legitimate legislative activity.'" *Dombrowksi v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney*, 341 U.S. at 376). A legislator cannot be questioned concerning legislative activities. *See Gravel v. United States*, 408 U.S. 606, 616, 629 (1972) ("[w]e have no doubt that Senator Gravel may not be made to answer – either in terms of questions or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting").

Various Courts of Appeals have recognized that the immunity operates not only as immunity from suit but also as a privilege that protects legislators, and others performing legislative activities, from questioning in any context, including discovery. *See Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (allowing former congressman, as non-party deponent, to refuse to answer questions concerning his activities while a legislator); *MINPECO, S.A. v. Conticommodity Services, Inc.*, 844 F.2d 856 (D.C. Cir. 1988) (affirming decision to quash subpoenas issued to custodian of records and congressional subcommittee staff director for information and documents in the subcommittee's possession); *Brown & Williamson*

Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995) (affirming decision to quash subpoenas, issued to two members of a congressional subcommittee, for documents stolen from a law firm and provided to the subcommittee); *Burtnick v. McLean*, 76 F.3d 611 (4th Cir. 1996) (noting, in providing instructions on remand, that plaintiff would have to present the case without testimony of board members who abolished plaintiff's job). This "legislative privilege" (sometimes referred to as the "testimonial strand" of the immunity), ensures that the legislative process is, for the good of the public, protected from disruption.

C. Application

"Absolute legislative immunity attaches to actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376). The determination of "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it" because "it [is] simply 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Id.* at 54-55 (quoting *Tenney*, 341 U.S. at 377). Document requests that seek information related to "actions taken in the sphere of legitimate legislative activity" are, accordingly, prohibited by the privilege.

The determination of whether the activity involved falls within the sphere of legitimate legislative activity is straightforward, as the Court of Appeals for the Third Circuit, relying on precedent of this Court, summarized in *Government of the Virgin Islands v. Lee*:

> In general [] the cases interpreting the Speech or Debate Clause in which

> legislative immunity has been triggered have involved manifestly legislative acts; acts which were so clearly legislative in nature that no further examination had to be made to determine their appropriate status. See e.g., United States v. Helstoski, 442 U.S. 477 (1979) (introducing proposed legislation); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (subpoenaing records for committee hearing); Doe v. McMillan, 412 U.S. 306 (1973) (inserting material in the Congressional Record); Gravel v. United States, 408 U.S. 606 (1972) (introducing evidence during committee hearings); United States v. Johnson, 383 U.S. 169 (1966) (delivering a speech on the floor of the House); Tenney v. Brandhove, 341 U.S. 367 (1951) (interrogating witnesses during committee hearing); Kilbourn v. Thompson, 103 U.S. 168 (1881) (voting on resolutions) ... . [T]he acts themselves were obviously legislative in nature. *It is the very legislative character of these acts which triggers the protection of legislative immunity.*

775 F.2d 514, 522 (3d Cir. 1985) (parallel citations omitted, emphasis added).

The subpoena at issue here was necessarily addressed to legislative activities because it sought documents involving research requested and conducted in preparation for redistricting proposals. As this Court has stressed, redistricting is a legislative process. *See e.g.,*

Reynolds v. Sims, 377 U.S. 533, 586 (1964) ("legislative reapportionment is a matter for legislative consideration and determination"). The process of enacting legislation, including the investigation and evaluation done before a bill is introduced, is legislative activity. *See e.g.*, *Doe*, 412 U.S. at 313 (authorizing an investigation, holding hearings and preparing a report are all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation ..."); *Lee*, 775 F.2d at 521 ("factfinding, information gathering and investigative activities" are afforded legislative immunity); *Pentagen Technologies Int'l. Ltd. v. Committee on Appropriations of the United States House of Representatives*, 20 F. Supp.2d 41, 43-45 (D. D.C. 1998) (quoting *Eastland*, 421 U.S. at 504) ("the Supreme Court has concluded that the power to investigate falls within the legislative sphere because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change'"). As the documents requested were protected absolutely from disclosure, the three-judge court erred in denying the motion for protective order.

D. Importance of the Issue

The common-law legislative privilege has strong constitutional overtones where, as here, the authority of the federal courts provides the basis for the issuance of discovery that intrudes upon the state legislative process. Without a clear statement concerning the privilege's scope and application, private parties will continue to target legislators, legislative staff persons, and others involved in the legitimate legislative process to discover information

regarding the motivation and meaning behind legislative activity and enactments -- a hazardous and forbidden inquiry – and to disrupt and manipulate the legislative process itself, perhaps for self-interested ends. In the absence of a clarifying statement by this Court, there exists a prescription for like intrusion into "legislative activity" at every level of government of each of the fifty states, as well as the District of Columbia, Puerto Rico, the United States Virgin Islands and other governments operating under the auspices of the United States Constitution.

Moreover, on the specific issue of legislative activities related to redistricting, the federal courts are commencing what is likely to be another decade of litigation. In many, if not most cases, parties will use compulsory process to try to obtain information about redistricting from legislative bodies. The pressure of imminent elections will often, as here, lead district courts to sweep aside objections in order to conclude the litigation on the merits. This Court should provide guidance to the federal courts for the handling of issues of legislative privilege in redistricting litigation.

CONCLUSION

In this unique situation, where the Court of Appeals has noted a probable jurisdictional defect based on Section 1253, this Court should take one of four alternative actions. First, it could dismiss the present appeal for lack of jurisdiction, and include, in its order of dismissal, a statement that the Court of Appeals, as opposed to this Court, would have jurisdiction over an appeal from an order denying a motion for protective order. Second, the Court could transfer the appeal presently before it for resolution by the Court of Appeals. Third, the Court could

stay its proceedings in this appeal pending resolution of the jurisdictional issue in the Court of Appeals and (a) if that court dismisses the appeal on the basis of Section 1253, treat the present Jurisdictional Statement as a Petition for Writ of Certiorari, vacate the Court of Appeals' order and direct that it hear the Caucus' appeal or (b) if that court decides to entertain the appeal before it, dismiss the present appeal. Fourth, should this Court, under any theory, determine that Section 1253 encompasses the issuance of compulsory process by a three-judge court and therefore conclude that a direct appeal *does* lie from the discovery order at issue, this Court should note probable jurisdiction of the appeal before it and proceed to address the merits.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

REPUBLICAN CAUCUS OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES,
Appellant

v.

RICHARD VIETH, *et.al.*
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

APPENDIX TO JURISDICTIONAL STATEMENT

JOHN P. KRILL, JR.
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MAY 21, 2002

52 pg

TABLE OF CONTENTS

Page

Order, Denying Motion for Protective Order (February 22, 2002) 1a

Notice of Appeal to the United States Court of Appeals for the Third Circuit 2a

Letter from Clerk of the United States Court of Appeals for the Third Circuit re: Dismissal for Possible Jurisdictional Defect 4a

Letter Brief of House Republican Caucus in Support of Jurisdiction in the United States Court of Appeals for the Third Circuit 7a

Notice of Appeal to the Supreme Court of the United States 16a

Subpoena Duces Tecum to the Custodian of Records of the Carnegie Mellon University 17a

Expedited Motion to Quash Subpoena or for Protective Order 20a

Memorandum of Law in Support of Motion to Quash Subpoena or for Protective Order 22a

Motion to Intervene of House Republican Caucus 37a

Memorandum of Law in Support of Motion to Intervene of House Republican Caucus 40a

Order, Granting Motion to Intervene
(February 22, 2002) 44a

Motion to Stay Order Denying Motion to Quash
or for Protective Order 46a

Order, Denying Motion to Stay Order
(February 26, 2002) 49a

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

ORDER

IT IS HEREBY ORDERED THAT Defendants' motion to quash the subpoena *duces tecum* served upon the Custodian of Records of Carnegie Mellon University is **DENIED**.

SYLVIA H. RAMBO
United States District Judge

February 22, 2002.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

NOTICE OF APPEAL

The Republican Caucus of the Pennsylvania House of Representatives, which was granted intervention in this matter, appeals to the United States Court of Appeals for the Third Circuit from the order denying the Motion to Quash Subpoena or For Protective Order entered on February 22, 2002.

February 25, 2002

Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
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Counsel for House Republican Caucus

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790
Website: http://www.ca3.uscourts.gov
Office of the Clerk
Marcia M. Waldron
215-597-2995

February 28, 2002

Linda Shorey, Esq.
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J. Bart DeLone, Esq.
Office of Attorney General of Pennsylvania
Strawberry Square, 15th Floor
Harrisburg, PA 17120

RE: Vieth, et al. v. Commonwealth of Pennsylvania, et al., C.A. No. 02-1580
MD PA No. 1:CV-01-2439

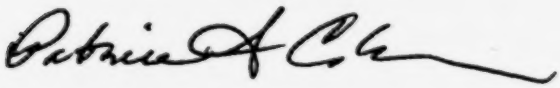
Dear Counsel:

Please be advised that the above captioned appeal will be submitted for possible dismissal due to a jurisdictional defect. It appears that the Court of Appeals lacks jurisdiction over the matter under 28 U.S.C. Section 1253 which provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges.

Responses to the possible dismissal of this case for lack of jurisdiction may be submitted by any party. The responses are to be filed within 14 days from the date of this order. All responses must be in proper form, i.e., an original and three (3) copies with a certificate of service.

Very Truly Yours,
MARCIA M. WALDRON, Clerk



By: Patricia S. Coleman,
Legal Coordinator

Cc: Chris Vasil, Supreme Court of the United States
Mary D'Andrea, Clerk U.S. District Court for the Middle District of Pennsylvania

APPENDIX D

March 13, 2002

Linda J. Shorey
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Marcia M. Waldron,
Office of the Clerk
United States Court of Appeals for
the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790

RE: Vieth, et al. v. Commonwealth of Pennsylvania, et al., C.A. No. 02-1580

Dear Ms. Waldron:

By letter dated February 28, 2002, counsel in the above-referenced appeal were asked to address the Court's concern that jurisdiction over the present appeal lies in the United States Supreme Court, and not in this Court. Specifically, the letter stated:

> Please be advised that the above-captioned appeal will be submitted for possible dismissal due to a jurisdictional defect. It appears that the Court of Appeals lacks jurisdiction over the matter under 28 U.S.C. Section 1253.

This letter brief, urging the Court not to dismiss for lack of jurisdiction under Section 1253, is submitted on behalf of Appellant (Intervenor below), the House Republican

Caucus of the Pennsylvania General Assembly ("House Republican Caucus").[1]

BACKGROUND

Plaintiffs in the underlying action challenge Act 1, legislation putting into place 19 congressional districts in the Commonwealth of Pennsylvania pursuant to the 2000 Census. Named as defendants were the Commonwealth of Pennsylvania, Governor Schweiker, Secretary Kim Pizzingrilli & Commissioner Richard Filling ("Executive Officers"), and Lieutenant Governor Robert C. Jubelirer & Speaker of the Pennsylvania House of Representatives Matthew Ryan ("Presiding Officers").

A three-judge court (Nygaard, C.J., Rambo, and Yohn, D.J.) was convened in this matter pursuant to 28 U.S.C. §2284(a), which provides, in pertinent part,

> (a) A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts . . .

On January 29, 2002, the three-judge court established a hearing date of March 11-12, 2002, and issued a discovery schedule.

On February 8, 2002, Plaintiffs served a subpoena *duces tecum* ("subpoena") on the Custodian of Records of

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[1] While the House Republican Caucus believes that this Court has jurisdiction over the present appeal, it will file a protective appeal with the United States Supreme Court if the jurisdictional issue is not resolved before expiration of the appeal period on March 24, 2002.

the Carnegie Mellon University, seeking production of the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

On February 19, 2002, Presiding Officers filed a motion to quash the subpoena, or alternatively, for a protective order. In their supporting memorandum of law, Presiding Officers argued that the subpoena should be quashed for failure to serve a notice of deposition on Presiding Officers' counsel and/or a protective order should issue to prohibit the discovery as violative of the common law legislative privilege. The House Republican Caucus (the present Appellant) filed a motion to intervene for the limited purpose of supporting Presiding Officers' motion.

On February 22, 2002, the three-judge court (Rambo, J.) granted the motion to intervene. By separate order, the three-judge court (Rambo, J.) denied the motion to quash the subpoena or for protective order. Presiding Officers and the House Republican Caucus jointly filed an immediate motion seeking to stay the latter order. On

February 25, 2002, the House Republican Caucus filed a timely notice of appeal to this Court.[2]

ARGUMENT

A. Interpreting Section 1253

Prior to 1976, three-judge courts were required in a myriad of different types of actions. *See Page v. Bartels*, 248 F.3d 175, 188-189 (3d Cir. 2001) (tracing evolution of three-judge courts).[3] Presently, three-judge courts are convened when required by an Act of Congress or where, such as here, a reapportionment statute is challenged on constitutional grounds. *See* U.S.C. §2284(a); *see also Page*.

Section 1253 governs appeals from orders entered by three-judge courts. That provision provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from

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[2] On February 25, 2002, the recipient of the subpoena produced most of the documents requested. On February 26, 2002, Presiding Officers and the House Republican Caucus jointly filed a letter seeking to withdraw their request for a stay. The three-judge court (Rambo, J.) denied the motion for a stay as moot on February 26, 2002. The House Republican Caucus is pursuing this appeal as the issue is one that is capable of recurring and again evading review.

[3] In 1976, 28 U.S.C. §§ 2281 & 2282 (sections of the Three-Judge Court Act) were repealed, largely to do away with the cumbersome mechanism of the three-judge court. Only Section 2284 remains in Title 28, in recognition of the belief that the benefit of the three-judge court in reapportionment cases outweighs its cumbersome nature. 22 MOORE'S FEDERAL PRACTICE §404.03[1] (3d ed. 2001).

> an order granting or denying, after notice and a hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. §1253 (emphasis added). Section 1253 is narrowly construed in light of the strong policy of minimizing the mandatory docket of the Supreme Court. *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975).[4] Under the plain language of Section 1253, the Supreme Court has direct jurisdiction to review only those orders of a three-judge court "granting or denying ... an interlocutory or permanent injunction."

The Supreme Court interprets Section 1253 consistent with the provision's plain language. In *Goldstein v. Cox*, 396 U.S. 471, 478 (1970), the Court noted that its "jurisdiction over interlocutory orders under §1253 is confined to orders granting or denying a preliminary injunction." In *MTM*, the Court stated that "a direct appeal will lie to th[e] [Supreme] Court under §1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief *only* where such order rests upon resolution of the merits of the constitutional claim." 420 U.S. at 804 (emphasis added). *See also* Robert L. Stern, et al., SUPREME COURT PRACTICE § 2.9 (7th ed. 1993) ("By referring without qualification to actions 'challenging

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[4] Much of the precedent interpreting and applying Section 1253 was issued before the 1976 reduction in three-judge courts. Because the language of Section 1253 was not altered by the repeal of numerous of the three-judge court statutes, these cases provide guidance in appeals in reapportionment cases. *See* MOORE'S FEDERAL PRACTICE §404.21[2][a].

the constitutionality' of apportionment, §2284(a) does not limit the use of three-judge courts to injunction actions ... [b]ut the only basis for directly appealing a reapportionment case to the Supreme Court is §1253, which authorizes direct appeals only from those three-judge court orders that grant or deny interlocutory or permanent injunctions").

The Supreme Court has also determined that an order of a three-judge court short of "granting or denying" injunctive relief is appealable *only* to the appropriate court of appeals under traditional rules of appealability. In *MTM*, 420 U.S. 799, for example, the Supreme Court held that it was without jurisdiction to review an order of a three-judge court dismissing the action where the dismissal was not on the merits of the constitutional claim but on principles of abstention. The Supreme Court vacated the order of the three-judge court and remanded "so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *Id.* at 804. In *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90 (1974), the Court found itself without jurisdiction under Section 1253 to review an order of a three-judge court dismissing a claim for lack of standing. Again, the Court vacated the three-judge court's order and remanded "so that a fresh order may be entered and a timely appeal prosecuted to the Court of Appeals." *Id.* at 101. In *Carey v. Wynn*, 439 U.S. 8 (1978), the Court held that jurisdiction to review an order of a three-judge court denying a request for a declaratory judgment lies in the court of appeals, not the Supreme Court.[5] *See also In re Slagle*, 504 U.S. 952 (1992) (White;

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[5] While the Supreme Court's jurisprudence interpreting Section 1253 has been criticized where the grant or denial of declaratory relief has the same practical effect as a grant or denial of an injunction, *see e.g.*, Stern, SUPREME COURT

J., dissenting to explain reason for dismissal of certified question) (mandamus petition to compel individual member of three-judge court to disqualify himself lies in court of appeals, not Supreme Court).

The courts of appeals have exercised jurisdiction to review three-judge court orders not denying or granting injunctive relief. In *Hastert v. Illinois State Bd. of Election Commissioners*, 28 F.3d 1430 (7th Cir. 1993), for example, the Court of Appeals for the Seventh Circuit held that it, as opposed to the Supreme Court, had appellate jurisdiction to review a final grant of attorney's fees by a three-judge court. The Court of Appeals for the Fifth Circuit, in *United States v. State of Louisiana*, 543 F.2d 1125 (5th Cir. 1976), held that an order of a three-judge court denying intervention was properly before it and not the Supreme Court. *See also Hays v. State of Louisiana*, 18 F.3d 1319 (5th Cir. 1994) (where three-judge court issued injunction on the merits before court of appeals could rule on the denial of intervention by three-judge court, court of appeals was without jurisdiction; once case is properly before Supreme Court, that court may consider all other interlocutory orders of the three-judge panel, including denial of intervention).

To the extent that footnote 23 in this Court's decision in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994), can be read to suggest that *any* order of a three-judge court may be appealed to the Supreme Court, such suggestion would be incorrect. In *Jordan*, this Court noted, in explaining why the Supreme Court had entertained an appeal from the three-judge court

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PRACTICE at §2.8, such criticisms are of no value here, as the grant or denial of a discovery motion does not approximate the effect of a grant or denial of an injunction on the merits.

in *Swarb v. Lennox*, 405 U.S. 191 (1972) (i.e., a case relied upon the district court whose order was under review in *Jordan*), that

> 28 U.S.C. §1253 then, as now, provided for direct appeal to the Supreme Court of any order granted or denied by a three judge district court. 28 U.S.C. §1253 (West 1993). See footnote 21, supra.

Id. at 1269 n.23. In *Swarb*, however, the plaintiff class sought an injunction against the application of *cognovit* provisions existing in Pennsylvania law, and the three-judge court had "enjoined the entry of any confessed judgment against a member of the [plaintiff] class in the absence of a showing of the required waiver." 405 U.S. at 200. Thus, the appeal in *Swarb* was within the Supreme Court's direct appellate jurisdiction under Section 1253 as the three-judge court had granted an injunction (albeit not one sufficient to satisfy the plaintiff class, who then appealed). *Jordan*, which referenced Section 1253 merely in summarizing another case, should not be read as binding precedent on the jurisdictional issue raised by this Court.

B. Application

The present appeal was not taken from an order of the three-judge court granting or denying injunctive relief. Indeed, the merits of the constitutional challenge to Act 1 have not yet been resolved, and the House Republican Caucus is not a defendant to the constitutional challenge.[6] Rather, the order from which the House Republican Caucus took the present appeal is a discovery order. As with an

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[6] A hearing on the merits of the claim in the underlying case was held on March 11-12, 2002. Post-hearing briefs are due March 15, 2002.

order granting attorneys' fees, *see Hastert*, or an order denying intervention, *see State of Louisiana*, jurisdiction to review an otherwise appealable discovery order that is collateral to the merits of the underlying constitutional challenge lies in the court of appeals, not the Supreme Court. Section 1253, by its plain language and as interpreted by the Supreme Court, will not support appealing a discovery order of a three-judge court to the Supreme Court absent "the mediating wisdom of a court of appeals." *MTM*, 420 U.S. at 803 ("issues short of the merits – such as justiciability, subject-matter jurisdiction, equitable jurisdiction and abstention – are often of more than trivial consequence ... discretionary review in any case would remain available"). Any other result would fly in the face of the strong policy favoring minimization of the Supreme Court's mandatory docket.

CONCLUSION

Because the discovery order appealed from does not grant or deny injunctive relief, jurisdiction to review the order of the three-judge court denying the motion for protective order lies in this Court, not the Supreme Court. Accordingly, the appeal should not be dismissed for lack of jurisdiction on the basis of 28 U.S.C. §1253.

Respectfully submitted,

/S/ Linda J. Shorey
John P. Krill, Jr.
Linda J. Shorey
Julia M. Glencer
Counsel for Appellant,
House Republican Caucus

cc: Counsel on Certificate of Service

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

The Republican Caucus of the Pennsylvania House of Representatives, which was granted intervention in this matter, appeals to the Supreme Court of the United States from the order denying the Motion to Quash Subpoena or For Protective Order entered in this action on February 22, 2002. The appeal is taken pursuant to 28 U.S.C. §1253.

March 22, 2002 Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500

APPENDIX F

Issued by the UNITED STATES DISTRICT COURT
Middle District of Pennsylvania

Case Number:[1] 1: CV 01-2439

RICHARD VIETH et al

Plaintiff(s),

v.

THE COMMONWEALTH OF PENNSYLVANIA, et al

Defendant(s).

SUBPOENA IN A CIVIL CASE

TO: Custodian of Records, Carnegie Mellon University
5000 Forbes Avenue Pittsburgh, PA 15213

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case

Place of Testimony:
Courtroom:
Date and Time:

☐ YOU ARE COMMANDED to appear at the place, date and time specified below to testify at the taking of a deposition in the above case

Place of Deposition:
Date and Time:

☐ YOU ARE COMMANDED to produce and permit inspection and copy of the following documents or objects at the place, date, and time specified below (list documents or objects):

(1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; and (2) all communications, including requests for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that caucus, and/or any employee or representative of any member pertaining to that contract.

Place: REED SMITH LLP
435 Sixth Avenue, Pittsburgh PA 15219-1886
Date and Time: February 14, 9:30 AM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.
Premises:
Date and Time:

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

Issuing Officer Signature and Title (Indicate if Attorney for Plaintiff or Defendant): /s/
Date: February 7, 2002

Issuing Officer's Name, Address and Phone Number: Robert B. Hoffman

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[1] If action is pending in district other than district of issuance, state district under case number.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

EXPEDITED MOTION TO QUASH SUBPOENA
OR FOR PROTECTIVE ORDER

Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") hereby file an expedited motion to quash subpoena or for protective order against the subpoena *duces tecum* issued by the Plaintiffs to the Custodian of Records of Carnegie Mellon University on February 7, 2002. Expeditious resolution of this motion is requested as counsel for the recipient of the subpoena *duces tecum* has indicated in writing that he intends to comply with the same on Thursday, February 20, 2002 unless this Court orders otherwise. A supporting Memorandum of Law and proposed form of order are attached.

February 19, 2002

Respectfully submitted,

/S/ Linda J. Shorey
Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
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(717) 231-4500
(717) 231-4501 (fax)
Counsel for Defendants
Jubelirer and Ryan

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439
	:	(Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH SUBPOENA OR FOR PROTECTIVE ORDER

This memorandum of law is filed in support of the motion to quash subpoena or for protective order filed by Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") against the subpoena *duces tecum* issued by Plaintiffs to the Custodian of Records of Carnegie Mellon University.

I. BACKGROUND

Discovery in this action, which challenges Act 1 (i.e., legislation putting into place 19 congressional districts in the Commonwealth of Pennsylvania pursuant to the 2000 Census), is currently underway. By order dated January 30, 2002, this Court set an expedited discovery in

advance of the evidentiary hearing scheduled for March 11-12, 2002. All discovery other than that requested by the subpoena *duces tecum* at issue here has been scheduled using e-mail, fax, telephone and face to face communication.

At approximately 5:00 PM on Thursday, February 14, 2002, counsel for Presiding Officers received a telephone message from Walter P. DeForest, General Counsel of the Carnegie Mellon University ("CMU"). When counsel spoke to Mr. DeForest approximately a half-hour later, she learned for the first time that a subpoena *duces tecum* had been issued by counsel for Plaintiffs, Robert Hoffman, Esq., to the Custodian of Records of CMU. Because she was unable to reach Mr. Hoffman by phone or by e-mail that evening, Mr. DeForest agreed to fax her a copy of the subpoena *duces tecum*. The fax, received at 7:31 PM, included a cover letter from Mr. DeForest (appended at Tab 1) and a copy of a subpoena *duces tecum* (attached at Tab 2).

The faxed copy of the subpoena *duces tecum* showed that the subpoena commanded the Custodian of Records of CMU (or a designee) to appear for deposition and requested production of the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton

> and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

Tab 2 (boxes checked for "You are commanded to appear" and "You are commanded to produce"). The date and time set for compliance was listed as February 14, 2002 at 9:30 AM. *Id.*

Mr. DeForest had explained, during the initial telephone conversation with counsel for Presiding Officers, that Plaintiffs' counsel, Mr. Hoffman, had agreed to limit the production request to the contract, invoices, checks and correspondence and that a deposition would not be necessary. The purpose of Mr. DeForest's initial contact with counsel for Presiding Officers had been to inquire whether she wanted copies of the documents that he intended to produce. As counsel for Presiding Officers had not received a copy of the subpoena *duces tecum* prior to its fax transmission from Mr. DeForest, and the faxed copy did not include a certificate of service, counsel asked Mr. DeForest to hold production until she could discern why she had not received notice and assess whether a privilege objection by Presiding Officers would be appropriate.

Counsel for Presiding Officers was informed the next day (Friday, February 15, 2002) by Mr. Hoffman that a service copy of the subpoena *duces tecum* had been sent to her by first class mail on February 8, 2002. Mr. Hoffman faxed her a Notice of Service, along with a copy of a subpoena and certificate of service, that had been filed

with the Clerk of the Middle District on February 8, 2002.[7] The copy of the subpoena did not have any boxes checked (copy attached as Tab 3).

That afternoon, Presiding Officers submitted written objections to the subpoena *duces tecum* (copy appended at Tab 4). First, pursuant to Fed.R.Civ.P.32 (d)(1), Presiding Officers objected that they had not, as a party, received notice of the deposition shown on the subpoena copy received from CMU, as required by Fed.R.Civ.P. 30(d)(1) ("[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action").[8] Second, Presiding Officers objected to the document production because the documents sought are protected from disclosure by the federal common law legislative privilege. With the latter objection in writing, and pursuant to Fed.R.Civ.P. 45(c)(2)(B), counsel for Presiding Officers informed both Mr. Hoffman and Mr. DeForest (copy of letter appended at Tab 5) that disclosure of the requested documents should not occur unless pursuant to court order.

On Monday, February 18, 2002, counsel for Presiding Officers received by first class mail a service

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[7] She later learned from counsel for Executive Officers, J. Bart DeLone, that Mr. DeLone's office had received a service copy of the subpoena *duces tecum* by mail but had not brought it to the attention of counsel for Presiding Officers prior to her present inquiry.

[8] Counsel for Presiding Officers raised an objection based on Fed.R.Civ.P. 30(b)(1) because, based on the copy of the subpoena *duces tecum* received from Mr. DeForest, it appeared that the Custodian of Records (or a designee) had been summoned for deposition. *See* Tab 3.

copy of subpoena *duces tecum* and certificate of service (copy attached at Tab 6); *see also* Affidavits of Cory Angell (Tab 7), Alan Moore (Tab 8) and Wanette Legaspi (Tab 9). Like the copy of the subpoena *duces tecum* faxed by Mr. Hoffman on February 15, 2002 (but unlike the copy faxed by Mr. DeForest), the service copy received by mail had no boxes checked.

Having unsuccessfully attempted to resolve this discovery dispute with Plaintiffs' counsel (*see* certificate of conferral attached to Motion), Presiding Officers now seek a protective order against the subpoena *duces tecum* pursuant to Fed.R.Civ.P. 26(b)(1) and 26(c). Expeditious resolution of this discovery dispute is appropriate as Mr. DeForest has indicated in writing that he intends to comply with the production request by February 20, 2002 unless ordered not to do so by this Court. *See* Tab 1. Additionally, the close of discovery in this matter is imminent.

II. QUESTIONS PRESENTED

1. Should the subpoena *duces tecum* be quashed because Presiding Officers did not receive a notice of deposition?

Suggested answer: YES.

2. Should a protective order be issued because the subpoena *duces tecum* requests documents and information protected against disclosure by the federal common law legislative privilege?

Suggested answer: YES.

III. ARGUMENT

A. Subpoena *Duces Tecum* Should Be Quashed

Presiding Officers do not contend that a copy of the subpoena *duces tecum* was not served on them by first class mail. Rather, they contend that they were not served with the notice of deposition required by Fed.R.Civ.P. 30(b)(1). Notably, the copy of the subpoena served on counsel for Presiding Officers is materially different than the copy received from Mr. DeForest and believed to have been served on the Custodian of Records of CMU. The copy received from Mr. DeForest had boxes checked next to "You are commanded to appear" and "You are commanded to produce." The copy faxed by Mr. Hoffman, and ultimately received by counsel for Presiding Officers by first class mail on February 18, 2002, had no boxes checked. As a party to this action, Presiding Officers are entitled to reasonable notice of deposition. Fed.R.Civ.P. 30(b)(1). In the absence of such, the subpoena *duces tecum* should be quashed.

B. A Protective Order Should Issue

1. Standard

Under Fed.R.Civ.P.26 (b)(1), a party "may obtain discovery regarding any matter, *not privileged*, which is relevant" to the subject matter involved in the pending action. (emphasis added.) "As an initial matter, [] all relevant material is discoverable *unless an applicable evidentiary privilege is asserted* [;] ... any material covered by a properly asserted privilege would necessarily be protected from discovery pursuant to Rule 26(b)(1)."

Pearson v. Miller, 211 F.3d 57, 65 (3d Cir. 2000) (emphasis added). *See also Rhone-Poulenc v. The Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994) (writ of mandamus issued to district court directing it to vacate order requiring the production of documents subject to attorney-client and work product privileges).

Presiding Officers, as explained below in Argument Section 4, have standing to raise this privilege objection to the subpoena *duces tecum* because it infringes upon their rights. *See e.g., Minnesota School Boards Association Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627, 629 (N.D. Ill. 1999) (agreeing that "it is well settled that a party has standing to object to a subpoena directed at a nonparty when the party claims a 'personal right or privilege' regarding the documents sought."); *see also Dreyer v. GASC, Inc.*, 204 F.R.D. 120, 121 n.3 (N.D. Ind. 2001) (citing *Minnesota School Boards* and allowing plaintiff to assert privilege under Fed.R.Civ.P. 45(c)(2)(B) against non-party subpoena issued to plaintiff's psychiatrist); 9 MOORE'S FEDERAL PRACTICE § 45.04[2] (3d ed. 2001) (party to action has standing to object to subpoena directed to a nonparty when the party claims a personal right or privilege regarding the documents sought).

2. The common-law legislative privilege

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), the United States Supreme Court recognized a common-law legislative immunity for state legislators that protects them, absolutely, from liability for their legislative activities. This immunity is co-extensive with the protection provided to members of Congress by the Speech or Debate Clause of the United States Constitution. *See Supreme Court of*

Virginia v. Consumers Union of the United States, 446 U.S. 719, 733 (1980). *See also Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (reaffirming *Tenney* and extending common law legislative immunity to local legislators); *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240, 249 (3d Cir. 1998) ("[T]he Supreme Court has recognized that in civil cases, the scope of the common law legislative immunity accorded state legislators is coterminous with that of the immunity provided by the Speech or Debate Clause"). The legislative privilege "preserve[s] the constitutional structure of separate, coequal, and independent branches of government," *United States v. Helstoski*, 442 U.S. 477, 491 (1979), and "insures that legislators are free to represent the interests of their constituents without fear [ ] they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1944).

The absolute legislative immunity applicable in civil matters extends beyond protection from liability and provides legislators with protection from "the burden of defending themselves" when "engaged 'in the sphere of legitimate legislative activity.'" *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (quoting *Tenney*, 341 U.S. at 376). The immunity operates as a privilege to protect legislators and others performing legislative activities from questioning in any context, including discovery. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("[w]e have no doubt that Senator Gravel may not be made to answer - either in terms of questions or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524 (9th Cir. 1983) (quashing deposition subpoena to non-party deponent former Congressman); *MINPECO, S.A. v. Conticommodity*

Services, Inc., 844 F.2d 856 (D.C. Cir. 1988) (affirming the quashing of subpoenas *duces tecum* to custodian of records and staff director of congressional subcommittee seeking information and documents within the subcommittee's possession); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995) (quashing subpoenas *duces tecum* issued to two Congressman for documents stolen from a law firm and submitted to congressional subcommittee).[9] As explained by the district court in *Marylanders for Fair Representation v. Schaefer*, 144 F.R.D. 292, 297 (D.Md. 1992), in a challenge to a legislative redistricting plan, "legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege."

"Absolute legislative immunity attaches to actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney*, 341 U.S. at 376). The determination of "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it" because "it [is] simply 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Id.* at 54-55 (quoting *Tenney*, 341 U.S. at 377). Document requests that

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[9] *See also Chapman v. Space Qualified Systems Corp.*, 647 F. Supp. 551, 554 (N.D. Fla. 1986) (quashing deposition subpoena issued to General Accounting Office investigator who, at the behest of the House of Representatives Committee on Governmental Operations, had been assigned to investigate the plaintiff, because the investigator's conduct and activities were "absolutely immune from discovery under the Speech or Debate Clause"); *United Transportation Union v. Springfield Terminal Railway Co.*, 132 F.R.D. 4 (D.C. Me. 1990) (denying motion to compel documents and deposition testimony from senator's assistant regarding subjects of potential and pending legislation).

seek information related to "actions taken in the sphere of legitimate legislative activity" are, accordingly, prohibited by the privilege.

The determination of whether the activity involved falls within the sphere of legitimate legislative activity is straightforward, as the Third Circuit pointed out in *Government of the Virgin Islands v. Lee*:

> In general [] the cases interpreting the Speech or Debate Clause in which legislative immunity has been triggered have involved manifestly legislative acts; acts which were so clearly legislative in nature that no further examination had to be made to determine their appropriate status. See e.g., United States v. Helstoski, 442 U.S. 477 (1979) (introducing proposed legislation); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (subpoenaing records for committee hearing); Doe v. McMillan, 412 U.S. 306 (1973) (inserting material in the Congressional Record); Gravel v. United States, 408 U.S. 606 (1972) (introducing evidence during committee hearings); United States v. Johnson, 383 U.S. 169 (1966) (delivering a speech on the floor of the House); Tenney v. Brandhove, 341 U.S. 367 (1951) (interrogating witnesses during committee hearing); Kilbourn v. Thompson, 103 U.S. 168 (1881) (voting on resolutions) ... . [T]he acts themselves were obviously legislative in nature. *It is the very legislative character of these acts which*

immunity).

775 F.2d 514, 522 (3d Cir. 1985) (parallel citations omitted, emphasis added).[10]

3. Application

The subpoena *duces tecum* at issue here is necessarily addressed to legislative activities because it seeks documents involving research requested and conducted in preparation for legislative redistricting proposals.[11] Redistricting is a legislative process. *See e.g. Reynolds v. Sims*, 377 U.S. 533, 586 (1964) ("legislative reapportionment is a matter for legislative consideration and determination"). The litigation in which the subpoena in question was issued involves the constitutionality of the law enacted by the General Assembly that puts in place the

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[10] While a criminal case, *Lee's* discussion of how a court identifies a legislative act is applicable whenever a court must decide if legislative activities are involved.

[11] Presiding Officers note that the contract sought is available to any member of the general public upon request to the leader of the House Republican Caucus. Fed.R.Civ.P. 26(b)(2) authorizes a court to limit the extent of discovery if the documents sought are "obtainable from some other source … ." *See also Allen v. Howmedica Leibinger, Inc.*, 190 F.R.D. 518 (W.D. Ten.. 1999) (in the absence of a showing that the publicly available information is inadequate, court finds the production request burdensome); *Duskin Pub. Group, Inc. v. Kinko's Service Corp.*, 136 F.R.D. 334 (D. D.C. 1991) (plaintiff not entitled to compel production of publicly available documents); *Bass v. Gulf Oil Corp.*, 304 F. Supp. 1041, 1049 (S.D. Miss. 1969) ("good cause" not shown in context of motion for production where "most, if not all, [of the documents requested], are readily available to the movants as public records").

19 congressional districts allocated to Pennsylvania after the 2000 census. The process of enacting legislation, including the investigation and evaluation done before a bill is introduced, is legislative activity. *See e.g., Doe*, 412 U.S. at 313 (authorizing an investigation, holding hearings and preparing a report are all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation ..."); *Lee*, 775 F.2d at 521 ("factfinding, information gathering and investigative activities" are afforded legislative immunity); *Pentagen Technologies Int'l. Ltd. v. Committee on Appropriations of the United States House of Representatives*, 20 F. Supp.2d 41, 43-45 (D. D.C. 1998) (quoting *Eastland*, 421 U.S. at 504) ("the Supreme Court has concluded that the power to investigate falls within the legislative sphere because 'a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change'"). The documents requested are protected absolutely from disclosure.

4. Presiding Officers Can Assert The Legislative Privilege

The legislative privilege is institutional when raised in the context of a constitutional challenge to legislation. *See United States v. Craig*, 528 F.2d 773, 780-81 & n.2 (7th Cir. 1976) (privilege provides "an institutional immunity for the legislature itself"); *see also In re Grand Jury Investigation*, 587 F.2d 589, 593 (3d Cir. 1978) (privilege is of "great institutional importance to the House as a whole, [and] it is also personal to each member"). Legislators seeking to preserve the privilege on the

institution's behalf must be permitted to assert it against those who would subvert its protections. *Cf. Montgomery County v. Schooley*, 627 A.2d 69, 120-121 (Md. App. 1993) (county could raise privilege against councilman to prevent testimony about redistricting process). Otherwise, a privilege which serves as a bulwark of separation of powers could be consistently lost for reasons conflicting with the interests of the institution. Presiding Officers must be allowed to assert the privilege against production of documents that implicate legitimate legislative activity.[12]

To permit waiver through the release of documents by a non-party who has been involved in the legislative process is inconsistent with the institutional purposes served by the privilege:

> The privilege protects the institution of the Legislature itself from attack [as well as] the individual legislators personally. ... *To allow the privilege to be waived would be inconsistent with these purposes.* The privilege is *institutional* in its protection of the Legislature, ensuring the separation of powers among the coequal branches of government. [Allowing] an individual legislator to waive the institution's privilege *would be to allow one to act on behalf of the whole in waiving the protection of a significant bulwark of our constitutionally mandated system of government.*

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[12] The House Republican Caucus has filed a motion to intervene for the limited purpose of supporting the present motion.

Holmes v. Farmer, 475 A.2d 976, 985 (R.I. 1984) (redistricting plan); *see also U.S. Football League v. NFL*, 842 F.2d 1335, 1375 (2d Cir. 1988) (purposes of Speech or Debate protection would be "'ill-served' if such waivers were permitted"). Indeed, in *Helstoski*, the Supreme Court strongly intimated that the legislative privilege cannot be waived. *See* 442 U.S. at 492 (Congressman's words and conduct were not explicit and unequivocal waiver ... "*assuming such a waiver can ever be made*") (emphasis added). Where legislation is challenged on constitutional grounds, and "the legislative process itself or [] the end product of that process," is under attack, "waiver by a non-party of the privilege may, in effect, dictate the waiver by other legislators of their privilege," and lead to the dismantling of the separation of powers pillar upon which the privilege is, in part, based. *See Montgomery County v. Schooley*, 627 A.2d at 121 (refusing waiver in challenge to redistricting plan).[13]

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[13] This is just the first time the Court will need to address issues of the legislative privilege in this matter. At the hearing held in state court in *Erfer v. Commonwealth et al.*, 14 M.M. 2002, Petitioners (represented by the same counsel as Plaintiffs here) called, *inter alia*, Representative DeWeese (Minority Leader of the Pennsylvania House of Representatives) to testify concerning the legislative process of enacting Act 1. Presiding Officers' counsel repeatedly objected to Rep. DeWeese's testimony as prohibited by Speech or Debate immunity under the Pennsylvania Constitution. The objections were taken under advisement. Commonwealth Court's recommended findings and conclusions did not rely on the testimony to which Presiding Officers objected and so made no ruling on the testimony. Final resolution of the issue, however, is unknown since the Pennsylvania Supreme Court has not yet issued an opinion in support of its denial of the *Erfer* Petitioners' state constitutional claims. It is anticipated that Plaintiffs will, at a minimum,

CONCLUSION

For the reasons set forth above, Presiding Officers respectfully request that the subpoena *duces tecum* issued to CMU be quashed or a protective order be issued, on the basis of the common law legislative privilege, to prevent the disclosure of the documents requested.

February 19, 2002

Respectfully submitted,

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Counsel for Defendants Jubelirer and Ryan

---

proffer Rep. DeWeese's testimony for the same purposes in this matter. Permitting even one breach of the legislative privilege that protects legitimate legislative activity will lead to the potential of testimony from each of the legislators, in both chambers, who considered and voted on the legislation, as well as that of those who assisted them in the process. Even the Governor, who signed the legislation, becomes a potential witness.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439
	:	(Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MOTION TO INTERVENE OF HOUSE REPUBLICAN CAUCUS

The Republican Caucus of the Pennsylvania House of Representatives hereby files this Motion to Intervene for the limited purpose of joining the Motion to Quash Subpoena or For Protective Order filed by Presiding Officers against the subpoena *duces tecum* issued by Plaintiffs to the Custodian of Records of Carnegie Mellon University. A memorandum of law in support of intervention is being filed contemporaneously with this motion. A proposed order is attached.

February 19, 2002

Respectfully submitted,

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Counsel for House Republican Caucus

CERTIFICATE OF CONCURRENCE/NON-CONCURRENCE

I certify, pursuant to Middle District L.R. 7.1, that on February 18, 2002, I sought the concurrence of Plaintiffs' counsel (Robert Hoffman, Esq.) in the foregoing motion and that concurrence was denied. Counsel for Defendants Executive Officers concurs in the foregoing motion.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
	:	No. 1:CV-01-2439
	:	(Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE OF HOUSE REPUBLICAN CAUCUS

The House Republican Caucus files this Memorandum of Law in support of its Motion to Intervene.

I. BACKGROUND

This action challenges Act 1, legislation putting into place 19 congressional districts pursuant to the 2000 Census. A hearing in this matter is presently scheduled before a three-judge court on March 12-13, 2002. It has come to the attention of the House Republican Caucus that Plaintiffs, on February 7, 2002, issued a subpoena *duces tecum* to the Custodian of Records for Carnegie Mellon University, seeking production of the following documents:

> (1) the contract between (a) the Pennsylvania House Republican Caucus and/or John Perzel and/or any related entity and (b) Carnegie Mellon University, the Pittsburgh Supercomputing Center, or any related individual or person relating to a demographic analysis of census data; an[d] (2) all communications, including request for maps or data, between Beverly Clayton and/or the Office of Sponsored Research (and its employees) and the Pennsylvania House Republican Caucus, any member of that Caucus, and/or any employee or representative of any member pertaining to that contract.

The documents requested are protected against disclosure by the federal common law legislative privilege. The House Republican Caucus, as the entity which engaged in the legislative activity implicated by the documents, has standing to assert the privilege.

II. QUESTION PRESENTED

Should the House Republican Caucus be permitted to intervene for the sole purpose of joining Presiding Officers' Motion to Quash Subpoena or For Protective Order that concerns documents requested by the subpoena *duces tecum*, dated February 7, 2002, issued to Carnegie Mellon University?

Suggested Answer: YES.

III. ARGUMENT

Intervention as of right for the limited purpose of asserting and protecting the legislative privilege is appropriate under Fed.R.Civ.P. 24. *See Gravel v. United States*, 408 U.S. 606 (1972) (United States Senator, as intervenor, asserting the legislative privilege to quash subpoena issued to legislative aide); *In re Grand Jury Proceedings*, 563 F.2d 577 (3d Cir. 1977) (state senator permitted to intervene in government proceeding to assert privilege against production of documents); *see also United States v. American Tel. & Tel. Co.*, 642 F.2d 1285 (D.C. Cir. 1980) (privileges, including work product privilege, satisfy the definition of "legal interest" in Fed.R.Civ.P 24; otherwise, entity with claim of privilege could suffer the obvious injustice of having his claim erased without ever being heard); *In re Grand Jury Matter*, 735 F.2d 1330 (11th Cir. 1984) (per curiam) (vacating district court's denial of motion to intervene by clients of attorney subpoenaed to appear before grand jury with client files).

The House Republican Caucus, if permitted to intervene, will join in the Motion to Quash or For Protective Order filed by Presiding Officers and adopt the memorandum of law filed in support thereof.

CONCLUSION

For the reasons set forth above, the House Republican Caucus requests that its motion to intervene for the limited purpose of supporting the Motion to Quash or For a Protective Order filed by Presiding Officers should be granted.

February 19, 2002

Respectfully submitted,

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APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

ORDER

The background of this order is as follows: On approximately February 14, 2002, Plaintiffs filed a subpoena *duces tecum* upon the Custodian of Records of Carnegie Mellon University ("CMU"). Plaintiffs sought from the Custodian certain records pertaining to work that CMU did on behalf of the Republican Caucus of the Pennsylvania House of Representatives ("Republican Caucus"). According to Plaintiffs, CMU performed complex statistical analysis that related to the census data and Act 1. On February 19, 2002, the Republican Caucus filed a motion to intervene for the limited purpose of joining the motion to quash the subpoena *duces tecum*.

Accordingly, **IT IS HEREBY ORDERED THAT** the Republican Caucus's motion to intervene is **GRANTED**.

SYLVIA H. RAMBO
United States District Judge

Dated: February 22, 2002

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 1:CV-01-2439 (Judge Rambo)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

MOTION TO STAY ORDER DENYING MOTION TO QUASH AND FOR PROTECTIVE ORDER

Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") file the instant motion to stay the order denying the motion to quash and for protective order against the subpoena *duces tecum* issued to the Custodian of Records of Carnegie Mellon University. Presiding Officers and the House Republican Caucus intend to seek an immediate appeal.

February 22, 2002

Respectfully submitted,

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Counsel for Defendants Jubelirer & Ryan and House Republican Caucus

CERTIFICATE OF CONCURRENCE/NON-CONCURRENCE

I certify, pursuant to Middle District L.R. 7.1, that on February 22, 2002, I sought the concurrence of Plaintiffs' counsel in the foregoing motion but, in light of the shortness of time since the order denying the motion was issued, have yet to hear. Counsel for Defendants Executive Officers concurs in the foregoing motion.

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APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY,	:	CIVIL NO. 1:CV-01-2439
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, *et al.*,	:	
Defendants	:	

ORDER

IT IS HEREBY ORDERED THAT Defendants' motion to stay order denying motion to quash and for protective order is **DENIED AS MOOT**.

SYLVIA H. RAMBO
United States District Judge

February 26, 2002.